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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH V. ORLEANS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
REX E. LEE,
Assistant Attorney General,
FRANK H. EASTERBROOK,
Assistant to the Solicitor General,
LEONARD SCHAITMAN,
ALLEN H. SACHSEL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–16a) is reported at 509 F. 2d 197. The opinions and order of the district court (Pet. App. 17a–27a) are not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29a) was entered on January 13, 1975. A timely petition for rehearing was denied on April 2, 1975. On June 23, 1975, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including July 31, 1975. On July 23, 1975, a further

extension was granted by Mr. Justice Marshall to and including August 30, 1975. The petition for a writ of certiorari was filed on that date and was granted on October 20, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employee of a community action agency that receives funding under the Economic Opportunity Act of 1964 is an "employee of the government" within the meaning of the Federal Tort Claims Act.

STATUTES INVOLVED

The Federal Tort Claims Act provides in pertinent part:

28 U.S.C. 1346(b):

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2671:

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.
>
> "Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.
>
> * * * * *

STATEMENT

1. Pursuant to Title II of the Economic Opportunity Act of 1964, 78 Stat. 516, as amended, 42 U.S.C. 2781 *et seq.*, the federal government, acting through the Community Services Administration (formerly the Office of Economic Opportunity), furnishes financial assistance for "community action programs" undertaken by "community action agencies." The Act defines a community action agency as a "State or political subdivision of a State * * * or * * * public or private nonprofit agency or organization which has been designated by a State or * * * political subdivision * * * which * * * is determined to be capable of planning, conducting, administering and evaluating a community action program * * *" (42 U.S.C. 2790(a)). In turn, "community action program" is defined as a program that pro-

vides "a range of services and activities having a measurable and potentially major impact on the causes of poverty in the community * * *" (*ibid.*).

The Act places a variety of restrictions on the kind of organization that may receive funding as a community action agency. For example, the organization's governing board must be representative of the interests of the community to be served;[1] the organization is required to assume several broadly defined responsibilities in connection with the operation of its community action program (42 U.S.C. 2795 (b)); it is required to observe administrative standards "which will assure, so far as reasonably possible, that all program activities are conducted in a manner consistent with the purposes of this [Act]" (42 U.S.C. 2796(a)).

But the Act also puts substantial emphasis on local control over community action programs and on the "maximum feasible participation of residents of the areas and members of the groups served" (42 U.S.C. 2781(a)(4)). A community action agency is encouraged to initiate programs other than those for which the federal government provides funds (42 U.S.C. 2795(b)(2)). Each community action agency must secure at least 20 percent of its own support from sources other than federal funds (42 U.S.C. 2812(c)).

[1] 42 U.S.C. 2791(b) provides that one-third of the governing board's members must be public officials, one-third must represent the poor in the area served, and the remaining members must be representative of business, labor, religious, welfare, education or other major interest groups in the community. See also 42 U.S.C. 2791(c).

The federal government is barred from establishing "binding national priorities" for the use of funds made available under the Act (42 U.S.C. 2808(e)). The governing board of each community action agency (which may not include any employee of the Community Services Administration; 45 C.F.R. 1015.735–19) has full authority "to appoint persons to senior staff positions, to determine major personnel, fiscal, and program policies, [and] to approve overall program plans and priorities" (42 U.S.C. 2791(e)).

2. The Warren-Trumbull Council for Economic Opportunity, Inc., is an Ohio corporation authorized to receive federal funds as a community action agency (Pet. App. 1a, 6a).[2] The Council's charter enumerates five corporate purposes, only one of which is the receipt of federal funds to operate community action programs (Pet. App. 18a). The Council was entitled to, but did not, gather support from other sources and devote itself to other goals. It did, however, acquire through in-kind services furnished by the community the 20 percent local support required by 42 U.S.C. 2812(c) (Pet. App. 24a–25a). The Council selected and carried out a variety of programs, all of which were funded by the federal government.

The Westlawn Neighborhood Opportunity Center is one of the Council's activities (Pet. App. la). Respondent Joseph V. Orleans, a minor, was injured in an automobile accident while returning from an outing sponsored by Westlawn (*ibid.*). The driver of the

[2] The Council was designated as a community action agency by the City of Warren and County of Trumbull, Ohio (Pet. App. 18a, 22a–24a).

automobile in which respondent was riding was another minor who also had attended the outing (*id.* at 1a–2a). Employees of the Council had arranged for respondent to ride in that car (*ibid.*).

3. Respondent Joseph Orleans, through his father, brought this suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671, alleging that "the agents of the United States of America in charge of [the Westlawn] outing were negligent in the organization and supervision of said outing * * *" (A. 5) and requesting $1,000,000 in damages (ibid.).[3]

The United States moved for summary judgment on the ground that the Council is not an agency or instrumentality of the United States and therefore its employees are not "employees of the Government" within the purview of the Tort Claims Act (A. 7-8). The district court granted the motion (Pet. App. 17a–21a).

On reconsideration the district court stated (Pet. App. 23a) that it "accepts the four basic facts upon which [respondents] base their conclusion" (Pet. App. 22a–23a):

> First, the Warren-Trumbull Council for Economic Opportunity, Inc. was created for the purpose of carrying out the community action programs contained in the Economic Opportunity Act of 1964. Second, the Warren-Trumbull Council and its activity, the Westlawn Neighborhood Opportunity Center, received funds from no source other than the Office of Economic Opportunity. Third, the Council conducted no programs other than those formulated and funded by the federal government. Fourth, the Office of Economic Opportunity and its regional office in Chicago exercised close supervision over the Council and its activities.

These four facts, the court held, do not make the Council an agency or instrumentality of the government because (1) the Council itself retains day-to-day control over its activities, (2) the Council itself decided which programs to operate and whether and how to implement them, and (3) the Council retains the option to receive funds from other sources and to administer programs outside the federal purview. The court wrote (Pet. App. 25a):

> The fact that the Council did not receive funds from sources other than the Federal Government whether through passive inaction or through affirmative action should not create a liability on the part of the United States when Congress did not intend the United States to be the sole source of such funds.

The court concluded that the Council was an independent contractor with the United States. Recognizing that a community action agency is entitled to be even more independent than an independent contractor—in other words, that most community action programs are "grantees" of federal funds—the district court reasoned (Pet. App. 27a):

> * * * [W]hile [the Council] does not institute its own projects, it is empowered to do so by its charter and is encouraged to do so by Congress. * * * [I]nstead of becoming an independent organization carrying on programs

[3] Joseph Orleans' father requested an additional $100,000 in damages (A. 6).

> initiated and funded by a variety of sources as envisaged by Congress, the Warren-Trumbull Council for Economic Opportunity, Inc. has become, in effect, an organization to contract with the Office of Economic Opportunity for Federal funds to run prepackaged Federal programs * * *.

4. The court of appeals reversed and remanded for trial. The court acknowledged that *Logue* v. *United States*, 412 U.S. 521, had held (1) that the Tort Claims Act invokes the "traditional distinction between employees of the principal and employees of an independent contractor" (Pet. App. 9a) and (2) that, under the traditional distinction, "[o]nly if the principal has the right to supervise the 'physical performance' of the work of such employees do they become employees of the principal" (*ibid.*). The court of appeals also acknowledged (Pet. App. 12a):

> The relationship between OEO and WTCEO meets a number of the criteria for establishing that WTCEO is an independent contractor. There was no showing that OEO controlled or supervised the physical performance of the work of employees of WTCEO and Westlawn. Moreover, the requirements imposed on these local agencies by statute and regulations are not concerned with the details of the day-to-day operations of the agencies or the programs which they carry on in the Warren-Trumbull County area. They are more in the nature of general instructions to be followed in order to assure that certain policies which Congress had adopted in establishing OEO are respected and adhered to.

The court nevertheless held that "resort to the traditional tests of the principal-contractor/employee relationship" (Pet. App. 16a) was inappropriate where the plaintiff was an intended beneficiary of a community action program and where the federal government retained, through the use of "guidelines" and prior approval, some control over the programs offered by the community action agency. Reasoning that both the Tort Claims Act and the Economic Opportunity Act "were designed to remedy conditions which caused hardship and human suffering" (Pet. App. 14a), the court concluded that Congress must have intended to make the government liable for any negligence of an employee of a community action agency that causes injury to an intended beneficiary who is "engaged in approved programs" (Pet. App. 15a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Tort Claims Act partially waives the sovereign immunity of the United States, subjecting the government to liability to the same extent as a private party for the torts its employees may commit in the course of their duties. *Dalehite* v. *United States*, 346 U.S. 15, 24–30. The Act does not, however, subject the United States to liability for the tortious acts of all individuals who may be engaged in programs Congress believes beneficial. The Act confers jurisdiction upon district courts only to entertain civil actions for money damages for injuries "caused by the negligent or wrongful act or omission of any em-

ployee of the Government while acting within the scope of his office or employment * * *" (28 U.S.C. 1346(b)). The Act defines "[e]mployee of the government" as including officers and employees of "any federal agency" (28 U.S.C. 2671) but provides that "federal agency" does not include "any contractor with the United States" (*ibid.*).

In *Logue* v. *United States,* 412 U.S. 521, this Court held that the United States is not liable for the negligence of employees of jails with which the federal government contracts for the safekeeping of federal prisoners. The Court there recognized that "the 'contractor with the United States' language of § 2671 adopts the traditional distinction between employees of the principal and employees of an independent contractor with the principal, and * * * that the critical factor in making this determination is the authority of the principal to control the detailed physical performance of the contractor" (412 U.S. at 527–528). Performance by a contractor of work that otherwise would have been performed by an employee of the government does not make the contractor a federal agency or its employees federal employees, the Court held, because then "the exclusion of contractors from the definition of 'Federal agency' in § 2671 would be virtually meaningless, since it would be a rare situation indeed in which an independent contractor with the Government would be performing tasks that would not otherwise be performed by salaried Government employees" (*id.* at 532).

Under the test articulated in *Logue,* a community action agency is not an agency or instrumentality

of the United States. As the court of appeals explicitly stated, "[t]here was no showing that OEO controlled or supervised the physical performance of the work of employees of [the Council] and Westlawn" (Pet. App. 12a). Since the federal government does not "control the detailed physical performance of" community action agencies, they are not federal agencies, and their employees are not "employee[s] of the Government" within the meaning of the Federal Tort Claims Act.

ARGUMENT

EMPLOYEES OF COMMUNITY ACTION AGENCIES THAT RECEIVE FUNDS UNDER THE ECONOMIC OPPORTUNITY ACT OF 1964 ARE NOT FEDERAL EMPLOYEES WITHIN THE MEANING OF THE FEDERAL TORT CLAIMS ACT

A. COMMUNITY ACTION AGENCIES ARE NOT SUBJECT TO DAY-TO-DAY CONTROL BY THE UNITED STATES

The first community action agencies were locally-organized private groups dedicated to the amelioration of poverty. These groups raised funds from local corporations and benefactors, from projects they initiated, from state and local governments, and from foundation grants. See generally Marris & Rein, *Dilemmas of Social Reform: Poverty and Community Action in the United States* 7–32 (1967); Moynihan, *Maximum Feasible Misunderstanding: Community Action in the War on Poverty* 1–127 (1969); Kravitz, *The Community Action Program—Past, Present, and Its Future?,* in *On Fighting Poverty* 52–69 (Sundquist ed. 1969).

The Economic Opportunity Act of 1964 was proposed to Congress as a package of programs, one of which was intended to provide an additional source of funds—the federal government—upon which local groups dedicated to community action could call. President Johnson's special message to Congress, transmitting the legislation that became the Economic Opportunity Act of 1964, described community action as a program designed to "give every American community the opportunity to develop a comprehensive plan to fight its own poverty—and help them to carry out their plans." 1 *Public Papers of the Presidents: Lyndon B. Johnson, 1963–1964,* 377 (G.P.O. 1965). The message continued (*id.* at 378):

> This program asks men and women throughout the country to prepare long-range plans for the attack on poverty in their own local communities.
>
> These are not plans prepared in Washington and imposed upon hundreds of different situations.
>
> They are based on the fact that local citizens best understand their own problems, and know best how to deal with those problems.
>
> These plans will be local plans striking at the many unfilled needs which underlie poverty in each community, not just one or two. Their components and emphasis will differ as needs differ.
>
> These plans will be local plans calling upon all the resources available to the community—federal and state, local and private, human and material.

Congress well understood the nature of the program for which it was providing federal money. The House committee report stated that, with respect to

community action agencies, "the role of the Federal Government will be to give counsel and help, *when requested,* and to make available substantial assistance in meeting the costs of those programs." H.R. Rep. No. 1458, 88th Cong., 2d Sess. 10 (1964) (emphasis in original). The Senate report is to the same effect. See S. Rep. No. 1218, 88th Cong., 2d Sess. 18 (1964).

The congressional statement of purpose relates (42 U.S.C. 2781(a)) that the "basic purpose" of the Act "is to stimulate a better focusing of all available local, State, private, and Federal resources upon the goal of" enabling low-income individuals "to become fully self-sufficient." The "specific purposes" of the Act include (42 U.S.C. 2781(a)(1)) "the strengthening of community capabilities for planning and coordinating Federal, State, and other assistance related to the elimination of poverty, so that this assistance, through the efforts of local officials, organizations, and interested and affected citizens, can be made more responsive to local needs and conditions;" and (42 U.S.C. 2781(a)(4)) "the development and implementation of all programs and projects designed to serve the poor or low-income areas with the maximum feasible participation of residents of the areas and members of the groups served * * *."

In order to achieve these goals the Act shields community action agencies from significant federal control. The Act forbids the establishment of "binding national priorities" (42 U.S.C. 2808(e)). In order to ensure that local community action agencies will be able to draw upon non-federal sources of support, the Act requires that all community action agencies

have charters allowing them to receive and administer funds from private and local public sources (42 U.S.C. 2795(a)).

The control of the programs to be carried out by a community action agency is vested in the board of directors of that agency. The board itself is free of federal control. 42 U.S.C. 2791(c) provides that the boards of directors of community action agencies are fully responsible for the operation of community action programs, and 42 U.S.C. 2791(b) provides that those boards of directors must be selected from the local community and interests to be served by the programs. The Community Services Administration has completed the statutory plan by providing that no Community Services Administration employee can serve on the board of any community action agency receiving federal funds. 45 C.F.R. 1015.735–19. The board of directors also has full authority over the day-to-day operations of the community action agency.

In sum, under the Act a community action agency is a local entity that receives federal assistance to carry out locally chosen and locally controlled programs. Federal involvement is limited to financial aid, guidance when requested, and oversight to protect against misapplication of funds (see 42 U.S.C. 2796 and 2835).

As a result of the freedom of operation established by these rules, many community action agencies became quite independent indeed.[4] The very independ-

[4] See Moynihan, *supra*, at pp. 128–166; Wofford, *The Politics of Local Responsibility: Administration of the Community Action*

ence of community action agencies led to repeated attempts in Congress to exert greater federal control over local agencies or to abolish the provision of federal money for community action programs.[5] Although Congress made some changes in the program, and although the administration of community action programs has been transferred from the Office of Economic Opportunity to the Community Services Administration, the basic guarantees of local independence are, and have been since 1964, as we have described them above.

B. BECAUSE COMMUNITY ACTION AGENCIES ARE NOT SUBJECT TO DAY-TO-DAY CONTROL OF THE FEDERAL GOVERNMENT, THEY ARE NOT FEDERAL AGENCIES

The Federal Tort Claims Act confers jurisdiction upon the district courts to entertain civil actions for money damages for injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment * * *" (28 U.S.C. 1346(b)). The Act defines "employee of the Government" as including officers and employees of "any federal agency" (28 U.S.C. 2671) but provides that the term "federal agency" does not include "any contractor with the United States" (*ibid.*). This Court in *Logue* v. *United States,* 412 U.S. 521, set forth guidelines for distin-

Program—1964–1966, in *On Fighting Poverty*, *supra*, at pp. 70–102; Farrel, *The View From the City: Community Action in Trenton*, in *id.* at pp. 127–157.

[5] See generally Selover, *The View from Capitol Hill: Harassment and Survival*, in *On Fighting Poverty*, *supra*, at pp. 158–187.

guishing between a "federal agency" and a "contractor" for purposes of the Federal Tort Claims Act.

The question in *Logue* was whether the United States is liable under the Act for the negligence of employees of local jails with which the federal government contracts for the short-term safekeeping of federal prisoners. In applying the Act, the Court recognized that the reference to "contractor with the United States" implicates "the traditional distinction between employees of the principal and employees of an independent contractor with the principal, and * * * that the critical factor in making this determination is the authority of the principal to control the detailed physical performance of the contractor" (412 U.S. at 527–528). The Court determined that the federal government did not possess or exercise any power of supervision of the physical performance of the work of the employees of the local jails and concluded that the United States therefore was not liable for their negligence.

In short, the Court held in *Logue* that the touchstone for determining whether an entity is a federal agency for purposes of the Federal Tort Claims Act is whether that entity is subject to the day-to-day control of the government. As we have demonstrated, a community action agency is guaranteed considerable latitude in its day-to-day operations. Indeed, a community action agency has far more latitude than did the local jail that the Court considered in *Logue*.

Under the contract in *Logue,* the objective to be achieved—the safekeeping of federal prisoners—was one chosen by the federal government. Federal em-

ployees were entitled to give, and did give, directions to the local jail concerning how this objective was to be accomplished (412 U.S. at 529–530):

> The county undertakes to provide custody in accordance with the Bureau of Prisons' "rules and regulations governing the care and custody of persons committed" under the contract. These rules in turn specify standards of treatment for federal prisoners, including methods of discipline, rules for communicating with attorneys, visitation privileges, mail, medical services, and employment. [And] the agreement * * * reserves to the United States * * * "the right to enter the institution * * * at reasonable hours for the purpose of inspecting the same and determining the conditions under which federal offenders are housed."

Here, by contrast, the community action agency has control over the goals it will pursue and the combinations of programs it will select in an attempt to achieve its objectives. The community action agency does not promise the federal government that its endeavors will be "successful," nor is the agency penalized for lack of "success." The role of the federal government in this process is quite similar to the role of a philanthropic foundation; the federal government offers financial support to groups that are already doing, or have proposed to do, what the government deems to be beneficial. The federal government helps the groups to initiate, expand, or improve their activities. But it does not direct or control those activities even in broad compass, let alone on a day-to-day basis. It follows that, for purposes of the Federal Tort

Claims Act, a community action agency either is or shares the essential attributes of an "independent contractor," and that its employees are not employees of the government.

The argument we have set out has been accepted by every other court that has considered the issue.[6] The court of appeals itself seemed to recognize the lack of statutory support for its conclusion, for it

[6] See *Vincent* v. *United States*, 383 F. Supp. 471 (E.D. Ark.), affirmed, 513 F. 2d 1296 (C.A. 8), petition for a writ of certiorari pending, No. 75-60; *Hughes* v. *United States*, 383 F. Supp. 1071 (S.D. Iowa); *Prater* v. *United States*, 357 F. Supp. 1044 (N.D. Tex.).

Employees of community action agencies also have been held not to be federal employees for other purposes. See *Hines* v. *Cenla Community Action Committee, Inc.*, 474 F. 2d 1052 (C.A. 5); *Robles* v. *El Paso Community Action Agency*, 456 F. 2d 189 (C.A. 5).

Cf. *United States* v. *Del Toro*, 513 F. 2d 656 (C.A. 2) (an employee of a model cities program receiving federal funds is not a "public official" within the meaning of 18 U.S.C. 201). We mention *Del Toro* without endorsing it; the Department of Justice has taken the position that the legislative history of 18 U.S.C. 201 demonstrates that the term "public official" as there used encompasses some individuals who are not employees of the United States but who are responsible for the administration of federal funds.

In the court of appeals respondents argued that *Maryland* v. *Manor Real Estate and Trust Co.*, 176 F. 2d 414 (C.A. 4), *Schetter* v. *Housing Authority of City of Erie*, 132 F. Supp. 149 (W.D. Pa.), and *Toth* v. *United States*, 107 *F. Supp.* 37 (N.D. Ohio), would support a conclusion that the Council is a federal agency or instrumentality. Those cases, however, which did not involve community action agencies, each turned on the court's determination that the United States possessed day-to-day control over the activities of the "contractor."

agreed (Pet. App. 12a) that the federal government did not maintain close surveillance over the activities of the Council and suggested that the *Logue* test might well be applicable if the injured party were "a member of the general public" (Pet. App. 15a). The court did not attempt to explain how, under any construction of the Federal Tort Claims Act, the question whether an individual is an "employee of the government" could turn upon the identity of the plaintiff.

The court of appeals instead attempted to support its decision by arguing that the Council is a federal agency because it was created in order to take advantage of federal funds and was dependent upon the United States for approximately 80 percent of its support (and all of its financial support). The district court anticipated and correctly answered this argument (Pet. App. 22a–27a). It held that the simple fact that the City of Warren and the County of Trumbull desired their citizens to receive the benefit of available federal money does not suffice to turn the entity they organized into an instrumentality or agency of the United States.[7] The Council's dependence upon federal money was the voluntary choice of the Council; Congress sought to encourage reliance upon non-federal sources and, indeed, upon non-governmental sources.[8] 42 U.S.C. 2795(b)(2) and 2812

[7] Cf. 42 U.S.C. 2790(e), providing that neither the city nor the county was required to establish a community action agency. See also *Baca* v. *United States*, 467 F. 2d 1061 (C.A. 10).

[8] Because the Council possessed substantial independence in setting goals as well as in selecting ways to achieve them, it might

(c). The Federal Tort Claims Act does not permit an entity to turn itself into a federal agency or instrumentality against the will of Congress. Nor does the fact that an entity receives most of its support from the federal government make it an agency or instrumentality of the United States. *Maryland* v. *United States,* 381 U.S. 41, 48.

The court of appeals also relied (Pet. App. 14a) upon the fact that many federal regulations govern or guide various parts of the Council's activities. But this, too, is irrelevant. In *Maryland* the Court held that the Maryland Air National Guard, which was required to "conform to strict federal requirements" (381 U.S. at 48), was not an agency or instrumentality of the United States.[9] See also *Lipka* v. *United States,* 369 F. 2d 288 (C.A. 2), certiorari denied, 387 U.S. 935; *Buchanan* v. *United States,* 305 F. 2d 738 (C.A. 8); *Gowdy* v. *United States,* 412 F. 2d 525 (C.A. 6). Such control as the federal government exercised over the Council amounted to nothing more than a right to ensure that federal funds were being spent properly and for the benefit of the poor.[10]

be possible to argue that the Council was a "grantee." An "independent contractor," this argument would run, possesses control over means but not over ends. Since *Logue* was concerned only with "independent contractors," the argument would conclude, that case does not preclude the possibility that a "grantee" like the Council is an agency or instrumentality of the United States.

We submit that this argument would be incorrect even as to the most independent community action agency. Under the analysis of *Logue* the more independent an entity becomes the less appropriate it is to call such an entity an agency or instrumentality of the United States. But, as the district court correctly perceived, respondents' assault on the Council's independence makes this hypothetical argument unavailable. The fact that the Council depended upon "prepackaged" (Pet. App. 27a) programs would demonstrate only that it had eschewed part of the independence allowed a "grantee" and had become, instead, "an organization to contract with the Office of Economic Opportunity for Federal funds to run * * * Federal programs for the Warren-Trumbull County Area" (*ibid.*)—in other words, that the Council had surrendered some control over ends while retaining control of day-to-day means, thereby becoming an independent contractor.

[9] Cf. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, and *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, both of which hold that extensive state regulation of an enterprise does not convert the actions of that enterprise into "state action."

[10] The court of appeals thought it significant that on one occasion the government had ceased federal funding until the Council had been reorganized and a new chairman of the board of directors had been selected. This incident, which did not amount to day-to-day control by the government over the Council's activities, is irrelevant under *Logue* and *Maryland*. *The* "control" exercised was that of general oversight or inspection to ensure that funds were not misused.

What is more, even a complete withdrawal of federal funds could not have forced the Council to cease operating in any manner it wished. The Council was authorized by its charter to obtain funds from sources other than the federal government. Any "control" exercised by the government through the power to terminate funds is not different either in kind or in degree from that exercised by private foundations that threaten to cease funding if conditions deemed necessary to the purposes of the grant are not met. Indeed, the major client of *any* independent contractor can impose sanctions and set conditions by threatening to withdraw its patronage.

C. THE EMPLOYEES OF THE COUNCIL WERE NEITHER "EMPLOYEES OF ANY FEDERAL AGENCY" NOR "PERSONS ACTING ON BEHALF OF A FEDERAL AGENCY IN AN OFFICIAL CAPACITY"

Under 28 U.S.C. 2671 an " '[e]mployee of the government' includes * * * employees of any federal agency * * * and persons acting on behalf of a federal agency in an official capacity * * *." Because, as we have demonstrated above, the Council is not an agency or instrumentality of the United States, its employees are not employees of the government under the first portion of this definition. The court of appeals observed, however, that community action agencies might be special cases because "Congress could have chosen to administer the Economic Opportunity Act directly by establishing local offices of OEO" (Pet. App. 14a). This suggests, however implicitly, that in the view of the court of appeals, the employees of the Council might be "persons acting on behalf of a federal agency"—in this case presumably the Office of Economic Opportunity or the Community Services Administration.

This suggestion is unavailing, for the fact is that Congress chose to make grants to independent local entities rather than to administer the poverty program directly. The situation is analogous to that in *Logue*: if the federal government had not contracted with local jails to hold federal prisoners, employees

of the government would have performed that function directly. The Court rejected Logue's argument that this converted the local jail's employees into "persons acting on behalf of a federal agency" (412 U.S. at 531–532; footnote omitted):

> [W]e are not persuaded that employees of a contractor with the Government, whose physical performance is not subject to governmental supervision, are to be treated as "acting on behalf of" a federal agency simply because they are performing tasks that would otherwise be performed by salaried employees of the Government. If this were to be the law, the exclusion of contractors from the definition of "Federal agency" in § 2671 would be virtually meaningless, since it would be a rare situation indeed in which an independent contractor with the Government would be performing tasks that would not otherwise be performed by salaried Government employees.

This case, in the last analysis, is controlled by the same principle that informed the decision in *Logue*: the United States is not responsibile for the torts of those over whom it lacks effective control. The United States has neither the right nor the ability to select or remove the employees of the Council, nor can the United States control the manner in which those employees go about their tasks. The employees of the

Council accordingly are not employees of the government for purposes of the Federal Tort Claims Act.[11]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
REX E. LEE,
Assistant Attorney General.
FRANK H. EASTERBROOK,
Assistant to the Solicitor General.
LEONARD SCHAITMAN,
ALLEN H. SACHSEL,
Attorneys.

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[11] Our interpretation of the Federal Tort Claims Act is reinforced by the fact that Congress expressly provided that enrollees in the Job Corps (42 U.S.C. 2727(a)(3)) and volunteers in the Volunteers in Service to America program (42 U.S.C. 2994b(b)(2)), two other components of the Economic Opportunity Act of 1964, were to be considered federal employees for purposes of the Federal Tort Claims Act. Although these sections are not conclusive of the intent of Congress, it is reasonable to infer that Congress did not intend to subject itself to Federal Tort Claims Act liability except to the extent specified.

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